Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554



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| In the Matter of | ) | |
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| Examination of Current Policy Concerning | ) | GC Docket No. 96-55 |
| the Treatment of Confidential Information | ) | |
| Submitted to the Commission | ) | |



# COMMENTS OF JOINT PARTIES

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## SUMMARY

The Telecommunications Act of 1996 has opened all telecommunications markets to competition. For this reason, the 1996 Act specifically includes protections for proprietary information of telecommunications carriers and equipment manufacturers. These protections must be incorporated into the Commission's rules governing treatment of proprietary information.

The Commission's rules should also recognize the relaxed standard for exemption from disclosure of information sought pursuant to Freedom of Information Act ("FOIA") Exemption 4. Exemption 4 permits the Commission to withhold from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." As held in the **Critical Mass** case, information submitted voluntarily is exempt from disclosure "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Moreover, a submission should be treated as voluntary, even if the agency has the ability to compel disclosure unless that compulsion is actually exercised.

Even where access to the records is compelled, the information is still exempt from public disclosure under Exemption 4 if one of two tests is met. First, public disclosure will not be required if releasing the information is likely to "impair the Government's ability to obtain necessary information in the future." Second, disclosure is not required if it is likely "to cause substantial harm to the competitive position of the person from whom the information was obtained."

In these Comments, the Joint Parties propose specific standards for evaluating different types of confidentiality requests in light of the above principles. These standards reflect a balancing of the conflicting interests that may be implicated by confidentiality requests. In

particular, they balance the heightened interest of telecommunications carriers in protecting confidential information in the new competitive era with the extent to which there is an interest in public disclosure of such data. In those situations where the Commission concludes that disclosure of data is appropriate, it should rely heavily on protective agreements to fulfill the mandate of Section 222 of the 1996 Act. The Joint Parties also endeavor to propose standards that are administratively workable.

One context in which confidentiality issues are of particular importance is in the context of tariffs. The Joint Parties propose that the Commission establish a nondisclosure policy for confidential information submitted with tariffs. The Commission would allow parties participating in a tariff review proceeding access to confidential information pursuant to a standard protective agreement. Such an approach would provide some measure of protection for confidential information submitted with tariffs, while permitting any party participating in a tariff review proceeding to have access to such information. It would also minimize the need for case-by-case, fact-intensive adjudications of confidentiality requests, which could significantly delay the tariff review process.

In the context of rulemakings, on the other hand, the Joint Parties recognize that protective agreements may be more difficult to administer, given the potentially large number of participating parties. In addition, time may be less critical in the context of rulemakings than it is in tariff proceedings. Therefore, case-by-case decisionmaking may be more feasible in the rulemaking context than in the tariff context. The Commission should consider all requests for confidential treatment of information submitted in rulemakings in light of FOIA standards and Section 222 of the 1996 Act.

The Commission acknowledges in the **Notice** that "[t]he detailed financial and commercial information inspected during an audit is generally sensitive in nature and is not customarily released to the public." The Commission should continue this policy of protecting information obtained during an audit. Any relaxation of the protection given to audit information would undermine the Commission's auditing capabilities and expose carriers to the risk of substantial competitive harm.

The Joint Parties agree that where the public interest may best be served by providing limited access to carrier confidential information, the model protective order appended to the **Notice**, with changes suggested in these comments, may provide adequate protection. In some cases, however, carrier information may be so sensitive that its release would be inappropriate even pursuant to a protective agreement. In those circumstances, redaction of the most sensitive information may be appropriate to provide limited access to the remainder of the document.

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# COMMENTS OF JOINT PARTIES

Ameritech, The Bell Atlantic Telephone Companies, Bell Communications Research, Inc., NYNEX Corporation, Pacific Bell and Nevada Bell, US West, Inc. and BellSouth Corporation ("Joint Parties") hereby comment in response to the Notice of Inquiry and Notice of Proposed Rulemaking ("**Notice**"), FCC 96-109, released March 25, 1996. A summary of the **Notice** was published in the Federal Register on April 15, 1996, 61 Fed.Reg. 16424. In order to facilitate Commission review, the Joint Parties have followed the organization of the **Notice** in these Comments.

## I. Introduction.

The Telecommunications Act of 1996 ("1996 Act") has established a "procompetitive, de-regulatory national policy framework . . . by opening all telecommunications markets to competition."[1] Not only does the 1996 Act eliminate all legal barriers to local exchange competition,[2] it also eliminates economic barriers. Specifically, through the requirements of

[1] Joint Explanatory Statement of the Committee of Conference (to accompany S.652), Report No. 104-458, at 113 (Jan. 31, 1996).
[2] 47 U.S.C. § 253.

Sections 251 and 271, the 1996 Act ensures that competition for local exchange services will develop quickly and on a sustainable basis. While, to be sure, there are still vestiges of regulation present, Congress has clearly directed that the Commission manage a transition to a fully competitive, deregulated telecommunications industry.

Consistent with these pro-competitive initiatives, the 1996 Act specifically limits the uses that can be made of proprietary information. New Section 222(a) imposes on all telecommunications carriers a duty to protect the confidentiality of proprietary information obtained from other carriers, from equipment manufacturers and from customers. Section 222(b) provides, further, that a carrier that obtains proprietary information from another carrier to provide a telecommunications service may not use that information for its own marketing efforts.

It is incumbent on the Commission to strengthen the protection it accords confidential information in light of these provisions. Information filed with the Commission that is made publicly available without restriction can easily be used for marketing purposes in competition with the carrier that supplied the data. This is unacceptable, particularly in markets in which competition is thriving and/or developing. To the extent that carriers are required to publicly disclose confidential information of third parties, such as equipment vendors, the competitive interests of those parties may be compromised as well.

With all telecommunications services open to competition, and in light of explicit Congressional policies favoring deregulation and limited access to competitive information, it is incumbent on the Commission to adopt forward-looking rules governing access to information that reflect the developing unregulated, competitive marketplace rather than the past monopoly environment.

## II. Background.

The **Notice** summarizes the Trade Secrets Act[3], the Freedom of Information Act ("FOIA")[4] and the Commission's rules implementing those statutes[5]. The Freedom of Information Act makes information in the possession of a federal agency available to members of the public upon request, unless such information is exempt from disclosure under one of the exceptions contained in FOIA. The exemption at issue here, Exemption 4, states that the disclosure requirement does not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[6]

The **Notice** also contains an extensive analysis of the jurisprudence that has helped shape the Commission's current rules and policies regarding access to confidential information.[7] In particular, the **Notice** recognizes the applicable legal standards for exempting confidential commercial information from disclosure under Exemption 4 that were articulated in two leading judicial decisions, **National Parks**[8] and **Critical Mass**[9].

In **National Parks**, the Court created two standards to determine whether information submitted to a government agency by a private citizen should be exempt from disclosure under Exemption 4:

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to

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[3] 18 U.S.C. § 1905.
[4] 5 U.S.C. § 552.
[5] 47 C.F.R. §§ 0.451-0.470.
[6] 5 U.S.C § 552(b)(4), codified at 47 C.F.R. § 0.457(d).
[7] **Notice**, paras. 3-29.
[8] **National Parks and Conservation Ass'n. v. Morton**, 498 F.2d 765 (D.C. Cir. 1974) ("**National Parks**").
[9] **Critical Mass Energy Project v. Nuclear Regulatory Commission**, 975 F.2d 871 (D.C. Cir 1992) ("**Critical Mass**").

> impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[10]

In **Critical Mass,** the exemption from disclosure standards articulated in **National Parks** was expanded for information submitted voluntarily to the government. In that case, the Court held:

> It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release. Accordingly, while we reaffirm the National Parks test for determining the confidentiality of information submitted under compulsion, we conclude that financial or commercial information provided to the government on a voluntary basis is "confidential" for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.[11]

It is also clear from the opinion in **Critical Mass** that the voluntary nature of an information submission is not destroyed simply because the agency has the power to compel submission of the information in question.[12]

In the competitive telecommunications marketplace mandated by the 1996 Act, access to confidential information filed with the Commission by a carrier can confer an unearned advantage to an existing or potential competitor. For example, the Commission's rules compel carriers offering new regulated services to provide cost and demand data in support of their proposed tariffs.[13] By learning the filing carrier's precise cost and estimates of demand, a competitor knows exactly how far the filing carrier can lower its price. Competitors thereby obtain gratuitous market information that will aid them in making entry and pricing decisions. Therefore, the public

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[10] **National Parks**, 498 F.2d at 770.
[11] **Critical Mass**, 975 F.2d at 879.
[12] Id.
[13] 47 C.F.R. § 61.38.

release of such information is likely to cause substantial competitive harm to the carrier submitting the information to the Commission. Moreover, this is precisely the kind of competitive inequity Sections 222(a) and (b)were intended to address.

## III. Issues for Comment.

### A. General Issues.

As an initial matter, the Commission seeks comment on how it should treat information found to be confidential for purposes of FOIA's Exemption 4. The Commission asks, in particular, whether parties seeking access to such information should continue to have the burden of making a "persuasive showing" in favor of release.[14]

The Joint Parties strongly favor retention of this requirement. Indeed, as competition for telecommunications services increases, it would be a grave mistake for the Commission to decrease the protection afforded to confidential information. Therefore, a party seeking FOIA access to confidential information should be required to show, with specificity, that: 1) access to the information is required; 2) the information cannot reasonably be obtained from other public sources and no alternative information is available that can achieve the public interest purpose of the requested disclosure; and 3) a compelling public interest would be served by permitting access. The party seeking disclosure should bear a heavy burden of showing that the public interest in disclosure outweighs the private interest of the provider in maintaining confidentiality of the information and, if appropriate, that the public interest in facilitating Commission access to confidential information in the future would not be impaired if disclosure were granted. The

[14] 47 C.F.R. § 0.459(d)(1).

Joint Parties believe that the Commission should codify this "persuasive showing" standard in Section 0.461 of the Rules.

In the event that the Commission decides that disclosure is warranted, the disclosure should be made pursuant to a strict, enforceable protective agreement.[15] The Joint Parties discuss the Commission's proposed model protective order and redaction below.

### B. Model Protective Order.

The Joint Parties agree with the **Notice** that there are circumstances in which a proper balance between the interest of the submitter of confidential information and the needs of a person requesting access to that information can be achieved through limited release pursuant to a protective order. In order for that balance to achieved, the protective order must provide adequate protection against public disclosure and appropriate sanctions if the terms of the protective order are violated. The Joint Parties have reviewed the model protective order attached to the **Notice** as Appendix A. The model protective agreement requires several modifications. The number and types of persons with access to the confidential information should be limited, and every person granted access should be required to execute an acknowledgment agreeing to be bound by the terms of the protective agreement. Copying of confidential information by persons gaining access under the protective agreement should be prohibited, or alternatively, strictly controlled. The protective agreement should also contain specific, effective sanctions for violations of the agreement. The Joint Parties have attached to these Comments as Appendix A specific proposals for modifying the model protective agreement attached to the **Notice**. With those modifications, the Joint Parties agree that the model

[15] **Notice**, para. 26, fn. 71.

protective agreement would be adequate to allow access to confidential information under the FOIA.

The Model Protective Order should be entered as an order of the Commission upon the joint request of the submitter and the requester. Once so entered, violations of the Order would be sanctioned as any other violation of a Commission order. In addition, by requiring that all persons seeking access to the confidential information agree to be personally bound by the Order, violations may give rise to private causes of action for enforcement and sanctions. The Joint Parties believe that both public and private rights are present when access to confidential information is granted, and both forms of remedy should be available in the event of a breach of the Order.

While useful tools, protective agreements are not a panacea. There are some kinds of confidential information that are so sensitive, for example, the algorithms and vendor proprietary information in the Bellcore cost models, that the proprietary interest of the submitter in its trade secret information outweighs the public interest in disclosure. In such cases, the Commission should continue to rely on the redaction process as described in the ONA Tariff Order.[16]

### C. Issues That Arise With Respect to Specific Types of FCC Proceedings.

#### 1. Title III Licensing proceedings.

The Joint Parties do not believe that Title III licensing proceedings are so different from other Commission proceedings as to require a special set of Rules governing the release of Exemption 4 materials.[17] A party should not be placed at a competitive disadvantage, or be

[16] Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd. 1522, 1526 (1992).
[17] **Notice**, para. 41.

required to forego valuable trade secrets, as a condition to becoming a Commission licensee. The standards proposed in these Comments are sufficiently flexible to accommodate Title III licensing proceedings, as well as other types of Commission proceedings.

While most information submitted in Title III licensing proceedings should be made publicly available, exceptions may arise in connection with experimental licenses. In many cases, these licenses are issued to facilitate development and testing of new technologies prior to the time that patent protection is obtained. In circumstances like these, it would be appropriate for the Commission to exempt from public disclosure those portions of the license application and subsequent required reports that could cause competitive or financial harm to the licensee.

### 2. Tariff Proceedings.

Perhaps the key context in which issues of confidentiality arise is in tariff filings. Under Commission rules, LECs subject to price cap regulation must file extensive cost support each time they introduce a new service or if they seek to price an existing service above or below price cap ceilings or floors. This cost information includes detailed information about the direct costs of providing services, as well as overhead loadings. It is quintessentially proprietary and competitively sensitive information.

The Commission has recognized that "an increasing variety of local telecommunications services are available on a competitive basis."[18] With passage of the 1996 Act, competition will accelerate rapidly. So long as the Commission continues to require incumbent LECs to provide cost support with certain tariff filings, it is imperative that the Commission adopt rules that allow for the protection of proprietary information. It is also critical that these rules establish clear and

[18] Price Cap Performance Review for Local Exchange Carriers, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 862 (1995).

workable standards that permit LECs to protect confidential information without delaying the effective date of their tariffs.[19] As competition continues to develop, any procedural mechanism that adds to the considerable delays that already attend new service and other filings would be untenable, anticompetitive, and directly contrary to the public interest.

### a. Cost Data is Proprietary and Highly Sensitive

Cost support data submitted with LEC tariffs is precisely the kind of sensitive, competitive information which can place LECs at a significant, unfair competitive disadvantage if disclosed. For example, it can give LEC competitors significant pricing advantages. Armed with knowledge of a LEC's direct costs and overhead loadings, the LEC's competitors would know precisely what the LEC's margins are, and they would be able to target their pricing, including their discounts to specific customers, accordingly. No competitor in an unregulated industry has the luxury of such information. Indeed, because cost information is so useful in predicting prices, if a LEC were competing in a sealed bid situation against a competitor, it would be an anticompetitive practice for the LEC to share cost information with that competitor.[20]

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[19] The Bell Joint Parties strongly oppose the suggestion in Paragraph 44 of The **Notice** that tariff filings be delayed pending rulings on confidentiality claims, as discussed below.

[20] United States v. J.L. Hammett Co., 1964 Trade Cases (CCH) ¶ 71, 178 (prohibiting sellers of school supplies from enforcing rights under price-fixing contract); United States v. Container Corp., 393 U.S. 333, 337 (1969) (exchange of price information violated § 1 of Sherman Act); U.S. v. Trenton Potteries Co., 273 U.S. 392, 396 (1927) (price-fixing agreements constitutes undue and unreasonable restraint on franchise in violation of the Sherman Act); Central & Southern Motor Freight Tariff Assoc., Inc. v. U.S., 777 F.2d 722, 732 n.5 (D.C. Cir. 1985) (dissemination of rate information poses severe antitrust risk); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, ¶¶ 221-226 (1994) ( discussion of Commission rules prohibiting collusion in the context of competitive bidding); see also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, ¶¶ 91-92 (1994).

Not only does cost information give competitors significant pricing advantages, it also gives them significant strategic advantages. For example, competitors can use cost information to determine which services and markets they can serve most profitably. They can then aggressively target those services and markets in which they have a lower cost structure, and they can avoid services and markets in which their cost structure is higher. In unregulated environments competitors do not have the benefit of such "inside information" as they make marketing decisions.

The Common Carrier Bureau has recognized that disclosure of cost data can confer substantial competitive harm. It has, for example, granted Exemption 4 protection to cost data filed by operator service providers, whose rates and practices had prompted passage of the Telephone Operator Consumer Services Improvement Act. In applying Exemption 4 to such data, the Bureau stated:

> Cost data and other information that would reveal a company's profit margins have been recognized by the courts as a category of information with considerable competitive implications. Gulf & Western Industries, Inc. v. U.S., 615 F.2d 527 (D.C. Cir. 1979); Timken Co. v. U.S. Customer Service, 491 F.Supp. 557 (D.D.C. 1980); Braintree Electric Light Dept. v. Department of Energy, 494 F.Supp. 287 (D.D.C. 1980). Disclosure of profit margins carries the obvious risk of enabling parties to underbid or under price their competitors. It is "virtually axiomatic" that disclosure of detailed financial data showing costs and revenues would, in normal competitive markets, be likely to enable a competitor to gain a substantial and unwarranted advantage. National Parks and Conservation Ass'n. v. Kleppe, 547 F.2d 673, 684 (D.D.C. 1976).[21]

Similarly, in granting protection to cost data submitted by Cincinnati Bell Telephone Company (CBT) in connection with its virtual collocation tariff, the Bureau stated that this data

[21] Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 5058 (1991) at para. 13.

"has the potential of revealing CBT's market plans and positions in the access services market." The Bureau also recognized that "a competitor would be provided a 'heads up' for use in negotiating their own rates or agreements."[22]

Courts have also recognized the inherently sensitive nature of cost data. In the **Gulf & Western** case cited by the Bureau, for example, the court stated:

> The [cost] information, if released, would likely cause substantial competitive harm...in that it would allow competitors to estimate, and undercut, its bids. This type of information has been held not to be of the type normally released to the public and the type that would cause substantial harm if released.[23]

Similarly, in **Timken**, the court found that cost data that allows third parties to "modify their own marketplace strategy and selectively under price [a company] to obtain a greater market share" is protected by FOIA because it would likely cause substantial competitive harm.[24]

### b. The Commission Must Establish Procedures that Permit LECs to Protect Confidential Cost Data Without Delaying Tariff Review.

Given the highly sensitive nature of cost data, it is essential that Commission rules accommodate the need of LECs to protect the confidentiality of this data. The Commission's asymmetric regulation of incumbent LECs and competitive access providers already skews the marketplace and stands as a barrier to the development of truly efficient competition. The Commission should not exacerbate this problem by allowing the tariff review process to remain a vehicle by which LEC competitors can obtain unfettered access to valuable, proprietary commercial information.

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[22] Letter from Kathleen M. Wallman, Chief, Common Carrier Bureau, to John L. McGrew, Esq., Wilkie, Farr & Gallagher, August 11, 1995, FOIA Request Control No. 95-223.
[23] **Gulf & Western**, 615 F.2d at 530.
[24] **Timken**, 491 F.Supp. at 560.

It is also critical that the Commission establish procedures for obtaining confidential treatment of cost support that do not effectively preclude expeditious review of LEC tariffs. In this regard, the Commission's suggestion that carriers seeking confidential treatment of cost data should submit their requests for Commission resolution prior to filing the associated tariff[25] is wholly inadequate. As the Commission recognizes, under this alternative, the tariff filing would then have to be deferred until the request for confidentiality was resolved.

LECs already must wait too long to effect tariffs that require cost support. Those tariffs must be filed on 45 days' notice, and the Commission can take as long as 120 days before allowing them to go into effect.[26] The delays are even longer for new services, which may also require a Part 69 waiver. The Commission has recognized that these delays are not in the public interest. For example, in speaking of delays associated with below-band price cap filings, the Commission stated:

> The current price cap plan may inhibit a LEC from lowering its prices to cost in certain instances, because of the administrative burden and length of time it can take for below-band filings to be approved. In those instances, inefficient entry may be encouraged and new or existing LEC competitors have no incentive to price their services at cost.[27]

The Commission has also stated its intent "to eliminate unreasonable restrictions or undue delays that our current rules may impose on LECs' ability to introduce new offerings."[28] For the Commission now to add to these delays by requiring that confidentiality requests be addressed on a case-by-case basis before a tariff can even be filed is unthinkable. It would effectively preclude LECs from responding to marketplace dynamics and introducing new services in anything

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[25] **Notice**, para. 44.
[26] Newly enacted Section 204(a)(3) reduces this notice period effective February 8, 1997.
[27] Price Cap Performance Review for Local Exchange Carriers, 11 FCC Rcd 858 at 896 (1995).
[28] Id.

approaching a timely manner without waiving their right to obtain protection of confidential data.[29]

Indeed, if the Commission establishes a procedure whereby every request for confidentiality is addressed on a fact-specific basis, LEC competitors will see this as just another opportunity to use the regulatory arena as a forum for obtaining competitive advantages.[30] They will contest every confidentiality request, hopeful that they will obtain information that would never be shared with a competitor in an unregulated market, and confident that, at the very least, they will be able to delay LEC pricing and service initiatives.

Recognizing the value of public participation in the tariff review process, the Joint Parties suggest that the most sensible approach would be to establish a nondisclosure policy for LECs willing to share cost support pursuant to a protective agreement. As the Commission recognizes:

> release of confidential information under a protective order or agreement can often serve to resolve the conflict between safeguarding competitively sensitive information and allowing interested parties the opportunity to fully respond to assertions put forth by the submitter of confidential information.[31]

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[29] The Commission has long recognized that the public interest is best served when carriers are able to respond quickly to marketplace dynamics. For example, in declaring AT&T to be a nondominant carrier, the Commission stated: "The cost of dominant carrier regulation of AT&T in this context includes inhibiting AT&T from quickly introducing new services and from quickly responding to new offerings by its rivals. This occurs because of the longer tariff notice requirements imposed on AT&T, which allow AT&T's tariffs to become effective. The longer notice requirements imposed on AT&T thus also reduce the incentive for AT&T to initiate price reductions." Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271 (1995) at para. 27.

[30] The Commission has recognized that carriers can and do abuse the regulatory process to delay, and thus thwart, their competitors' strategies. Id.

[31] **Notice,** para. 36.

Moreover, permitting LECs to limit disclosure of cost data to those who execute a protective agreement would greatly diminish the need for case-by-case Exemption 4 adjudication.[32]

Parties exercising this option could be required to file a notice with the Commission three days before their tariff filing in order to give interested parties the opportunity to execute the protective agreement and thereby secure prompt access to the cost data at issue. The notice would include a description of (1) the tariff filing to be made; (2) the type of cost support information to be treated as confidential; and (3) such other information as may be necessary for parties to obtain access to the confidential information, including, for example, the address at which the information is housed. To avoid disputes over the terms of the protective agreement, the Model Protective Agreement, amended as proposed in Appendix A of these Comments, should be adopted in this proceeding. That agreement would be used in all tariff review proceedings.

While the option of limiting disclosure to those signing a protective agreement should diminish LECs' legitimate concerns with regard to disclosure of sensitive proprietary cost data, the Commission must also recognize that protective agreements are not a cure-all. Violations of protective agreements can be difficult to detect and prove. Damages can be even more difficult to

[32] The Commission suggests that a disadvantage of protective orders is that they are "sometimes cumbersome and increase the administrative burdens on the Commission and those subject to them." **Notice** at para 31. These concerns are overstated. Any minor inconveniences imposed by protective agreements do not outweigh the legitimate interests of LECs in protecting proprietary commercial information. The Commission also suggests that protective orders may make it less likely that the Commission will receive a diversity of public comment on the protected materials. Id. This concern is overstated. As a practical matter, the only entities that ever intervene in the tariff review process, even when the use of cost materials is unrestricted, are LEC customers and competitors, all of which are very large businesses that are more than capable of following the procedures specified in a nondisclosure agreement. Moreover, these requirements are not so burdensome, in any event, as to preclude any other interested party from participating.

prove. Therefore, the Commission must preserve the option of LECs to seek complete protection of cost data if circumstances warrant. In that event, however, the carrier seeking to avail itself of this option should be able to do so at the time they file the tariff, rather than before the tariff filing, so as to minimize unnecessary delays. The tariff involved should be allowed to go into effect on schedule: (1) if the party demonstrates that confidentiality is warranted under Exemption 4 and the Commission concludes that the tariff is not patently unlawful as to warrant rejection; or (2) the Commission finds that public access to the cost support is unnecessary to assist the Commission in the review of the tariff. Otherwise, suspension and investigation or rejection would be appropriate.

Establishing these two options will best enable the Commission to "fulfill [its] regulatory duties in a manner that is efficient and fair to the parties and members of the public who have an interest in [its] proceedings."[33] The first option will allow some protection of sensitive cost support submitted with tariffs without protracted adjudication and without compromising the ability of interested parties to fully participate in the tariff review process. The second option preserves the existing rights of parties to seek more extensive Exemption 4 protection. It also recognizes that the Commission should have the discretion to determine, based on its own review, that a tariff is clearly lawful and that no public purpose would be served by litigating the confidentiality issue.

### 3. Rulemaking Proceedings.

Rulemaking proceedings are inherently public, and it is not unreasonable for the Commission to expect that the vast majority of the information it receives in rulemaking

[33] **Notice,** para. 1.

proceedings will be placed on the public record.[34] In special circumstances, however, protection of confidential information may be necessary. For example, ratemaking proceedings are rulemakings under the Administrative Procedures Act.[35] However, ratemaking proceedings are unique forms of "rulemaking" in which confidential information should be subject to the procedures and criteria proposed above. The Commission should not adopt an absolute prohibition on the submission of Exemption 4 material in redacted form, or subject to an appropriate protective order. Such an absolute rule could prevent the Commission from receiving access to information that it may need to protect the public interest. It is sufficient for the Commission to state, as a policy matter, that rulemaking proceedings are conducted on a public record, and requests for confidential treatment for information submitted in a rulemaking proceeding will be granted only in limited circumstances, when the public interest so requires.

### 4. Requests for Special Relief and Waivers.

Requests for special relief and waivers[36] are the type of proceedings where it may be particularly necessary and appropriate for the Commission to consider confidential information in arriving at its decision. By definition, such cases impose a burden upon the party seeking special relief or a waiver to show that the application of the general Commission rule will work an unusual or unique hardship on that party. The Commission should not adopt a rule or policy that would hinder a party from meeting its burden of proof, even if the evidence needed to support the waiver is confidential commercial information. The Commission still has the option of requiring the release of such information as a condition to the grant of the special relief or waiver if it

[34] **Notice**, para. 46-47.
[35] 47 U.S.C. § 551(4).
[36] **Notice**, para. 48.

believes that the public interest so requires, such as when the case may have precedential value. The party submitting the waiver request would then have to decide whether to accept the waiver and forego the benefit of Exemption 4. In any event, such cases are likely to be sufficiently infrequent that a case-by-case determination will not unduly burden the Commission.

### 5. Formal Complaints.

As the **Notice** correctly recognizes, formal complaint proceedings under Section 208 are adjudications of the rights of the individual parties to the proceeding.[37] Such proceedings frequently require access to confidential commercial information that is within the scope of Exemption 4. Parties to formal complaint proceedings should not be required to choose between providing a complete prosecution or defense in such proceedings and giving up its right to protect confidential commercial information.

Indeed, a contrary rule would invite anticompetitive abuse. A party could file a complaint for the sole purpose of securing access to competitively sensitive information with the knowledge that the other party to the proceeding could not adequately prosecute or defend the case without disclosing competitively sensitive information. The use of protective orders and/or redaction, while not perfect, is superior to any absolute rule that would require a party to a complaint proceeding to either publicly disclose confidential commercial information or waive its claim or defense.

While discovery disputes are not uncommon in formal complaint proceedings, the Commission has recently revised its formal complaint rules to facilitate resolution of such

[37] **Notice**, para. 49.

disputes. As stated in the **Notice**,[38] those revisions include provisions to minimize discovery disputes and to facilitate their resolution without undue burden on the Commission or the parties, and without undue delay.

The **Notice** suggests that it may sometimes be necessary to issue parts of adjudicatory decisions under seal in order to adequately explain the decision for purposes of judicial review.[39] The Joint Parties believe that such situations will be sufficiently rare that it will not unduly hinder the administration of complaint proceedings or unduly limit the precedential value of the Commission's adjudications. In the vast majority of cases, the Commission should still be able to draft decisions of precedential value without public disclosure of confidential commercial information.

### 6. Audits.

Another area in which confidentiality issues are critical is in the context of audits. As the Commission acknowledges in the **Notice**, "[t]he detailed financial and commercial information inspected during an audit is generally sensitive in nature and is not customarily released to the public."[40] The Commission's policy of not releasing information obtained from carriers during the course of an audit, however, is not grounded solely, or even primarily, on the confidential nature of the specific information obtained from the carrier, but on the impact that a policy of public disclosure would have on the Commission's ability to secure cooperation from the carrier in the future. Thus, the Commission's policy with regard to nondisclosure of audit materials is

[38] **Notice**, para. 49.
[39] **Notice**, para. 50.
[40] **Notice**, para. 51.

grounded in the first prong of the **National Parks** test, "to impair the Government's ability to obtain necessary information in the future."[41]

In paragraph 51 of the **Notice**, the Commission explains why its ability to obtain necessary information in the future would be impaired if audit related materials were routinely released to the public. The audit process relies upon and receives the full cooperation of the carriers. The auditors frequently make broadly worded inquiries which allow considerable latitude on the part of carriers in framing a response. The practice to date has been to assist the auditors in performing their duties by asking follow-up questions to determine the intent of the inquiry, and then providing the auditors with responsive information. Carriers also frequently assist the auditors by providing access to subject matter experts to explain complex technology and processes and to put fragments of information into context. Such cooperation is grounded in the expectation that the information and materials submitted during an audit will remain confidential unless there is an extraordinary public interest requirement to disclose the information. Thus, the Commission is correct, if somewhat understated, in its assessment in the **Notice**:

> The Commission has also recognized that if audit materials were routinely disclosed, it would be likely that the voluntary assistance in providing information would diminish, especially since the audits do not present the expectation of a government-bestowed benefit on the carrier.[42]

Were the Commission to change its policy regarding the confidentiality of audit materials, the carriers' response to audit inquiries would necessarily change as well. If audit materials were routinely disclosed, carriers would of necessity view each audit inquiry as a possible precursor to

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[41] **National Parks**, 498 F.2d at 770.
[42] **Notice**, para. 51.

litigation. In the absence of an expectation of confidentiality, the appropriate litigation strategy would be to respond very literally to the auditor's inquiries.

It was precisely to avoid such results that the first prong of the **National Parks** test was created. Citing the legislative history, the Court noted that the House Report stated with respect to Section 552(b)(4):

> It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.[43]

While the Commission has not obligated itself never to disclose publicly information obtained during an audit, it has clearly indicated that such information will be disclosed only in "extraordinary circumstances". Thus, the **Notice** states:

> 52. The Commission has departed from its general policy and publicly released audit reports only in extraordinary circumstances when (i) the summary nature of the data contained in a particular report is not likely to cause the providing carrier substantial competitive injury, (ii) the release of the summary data and information is not likely to impair our ability to obtain information in future audits and (iii) overriding public interest concerns favor release of the report.[44]

The Joint Parties recommend that the Commission codify its policy with regards to the confidentiality of audit information by adding to Section 0.457(d) of the Rules the following sentence:

> This includes any information obtained by the Commission during the course of or in connection with an audit, investigation or examination of records.

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[43] **National Parks**, 498 F.2d at 768.
[44] **Notice**, para. 52.